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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

AETNA LIFE INSURANCE COMPANY,

Petitioner,

v.

SHERRIE ACE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In concluding that the district court abused its discretion in granting a new trial, did the Ninth Circuit Court of Appeals err and apply a different standard of review than other Circuits apply when reviewing a new trial order?

2. Do this Court's due process cases concerning post-verdict review of punitive damages awards have any bearing on this case at this stage, since the district court has not yet conducted the proceedings required on remand to determine the proper amount of remittitur?

3. When the district court's order granting a new trial adopted without explanation the grounds asserted by the defendant and the record does not support *any* of the asserted grounds, did the appellate court err in reversing the new trial order without remanding the case to the district court for further explication of its decision?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This case arises from an insurance bad faith suit filed in state court in Alaska and removed to federal court based on diversity jurisdiction. A properly instructed jury found that Aetna Life Insurance Company acted in bad faith in denying Sherrie Ace's claim for long-term disability benefits and further found by clear and convincing evidence that Aetna's conduct was outrageous and deserving of punitive damages under Alaska law.

In response to post-trial motions by Aetna, the district court upheld the jury's finding of bad faith and its award of compensatory damages, but granted judgment as a matter of law to Aetna on the issue of its liability for punitive damages. The district court also conditionally ordered a new trial on the issue of Aetna's punitive damages liability. The district court did not reach Aetna's alternative motion for a remittitur or a new trial on the amount of punitive damages.

Both Ace and Aetna appealed. The Ninth Circuit concluded that the district court erred in setting aside the portion of the jury's verdict finding Aetna liable for punitive damages. The panel determined unanimously that the evidence in the record amply supported the jury's determination that Aetna acted outrageously, with malice, bad motives, or a reckless indifference to Ace's interests, justifying punitive damages under Alaska law. The panel also unanimously reversed the conditional order granting a new trial on the question of Aetna's liability for punitive damages. However, the panel held that the amount of punitive damages awarded by the jury was excessive, and remanded the case to the district court to determine the appropriate remittitur. The Ninth Circuit rejected Aetna's cross-appeal arguments concerning the sufficiency of the evidence supporting the verdict on bad faith and the jury instructions on compensatory damages.

Aetna's petition for issuance of a writ of certiorari asks this Court to review three issues all ancillary to the central issues in this

case. The proceedings required on remand in the district court have not yet been held; there is no final judgment in this case. Thus, despite Aetna's attempts to call attention to the amount of punitive damages awarded by the jury, the size of the award is *not* an issue before this Court. Further, in this Court, Aetna does not challenge the appellate court's ruling upholding the verdict that Aetna acted in bad faith or the ruling reversing the grant of judgment as a matter of law on the issue of Aetna's liability for punitive damages. Thus, at this stage Aetna is bound by the findings of the jury and the Court of Appeals that a preponderance of evidence established that Aetna acted in bad faith in denying Ace's claim for long-term disability benefits and that clear and convincing evidence established that Aetna acted outrageously when denying Ace's claim. Aetna now contends only that the Ninth Circuit erred in reversing the district court's conditional order for a new trial on the question of Aetna's liability for punitive damages. Aetna seeks an order directing a partial new trial on punitive damages liability or, in the alternative, an order directing the Ninth Circuit to give the district court another chance to explain its bases for granting a new trial.

Aetna's petition for certiorari should be denied. Contrary to Aetna's claims, there is no inter-Circuit conflict on the standard for when a district court may substitute its judgment for that of the jury; the Ninth Circuit's denial of Aetna's request for a second trial did not violate due process; and the Ninth Circuit's decision to reverse the grant of a new trial, rather than to remand for additional explanation of the district court's grounds, did not depart from normal procedures, inasmuch as the record reviewed by the Ninth Circuit established no basis at all for granting a new trial. None of the issues raised by Aetna warrants attention by this Court.

STATEMENT OF THE CASE

Aetna's statement of the case presents many facts in the light most favorable to itself. In light of the jury verdict and the portions of the decisions below that Aetna does not challenge, Aetna's perspective is both legally erroneous and unhelpful to this Court. The opinion of the Ninth Circuit presents an accurate,

comprehensive statement of the facts surrounding Aetna's improper denial of Sherrie Ace's claim for long-term disability benefits. [App. 3a-10a]. The following paragraphs provide a short summary. None of the facts set forth in this section was disputed at trial.

A. Ace's Disability

Sherrie Ace was an employee of the State of Alaska. [App. 3a; 1 Tr. 170[1]]. Her job required rigorous travel in off-road vehicles in remote areas of the state. [App. 5a n.6; 1 Tr. 170-71; 4 Tr. 8-9]. As part of her employee benefits, Ace selected and paid monthly premiums for the maximum possible health and disability insurance. [App. 3a; 1 Tr. 174-76, 189-90; ER 22, 24].

In 1986, Ace broke her leg in an accident. [App. 3a; 1 Tr. 172-73]. She submitted her medical records and bills to Aetna, which paid them. [1 Tr. 189; 2 Tr. 94-95]. From the beginning, Ace's doctors made clear that she had suffered a particularly bad break that had shattered her knee; complete repair was impossible, and it was likely that Ace's knee would cause long term problems and could eventually require a total replacement. [App. 3a; 1 Tr. 173; ER 59-63, 65-69]. Between 1986 and 1992, Ace's knee deteriorated as predicted. Her doctors performed a series of surgeries, each of which provided only temporary relief. Ace regularly submitted her medical records and bills to Aetna. [App. 3a; 1 Tr. 178-82, 187; ER 78, 81, 148-49, 153-55].

By early 1992, Ace's leg had become so extraordinarily painful that her orthopedic surgeon recommended an osteotomy, a procedure in which the knee bones would be re-broken and re-set in the hope of shifting her weight onto less damaged parts of her

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[1] For the convenience of this Court, citations to the trial court transcripts and the excerpt of record follow the same form as in the petition. "CR" is used to denote documents docketed in the district court file. This opposition includes citations to the record for every point relied on in the Ninth Circuit's opinion, to dispel any suggestion that the appellate court misread the record.

knee. [App. 3a & n.2; 1 Tr. 183-84, 187; ER 92-94, 156-59]. The osteotomy was performed in April, 1992. The surgeon issued Ace a four-month excuse from work to cover her anticipated recovery time. [App. 3a; ER 95-96, 104]. Under her Aetna policy, Ace was entitled to short-term disability benefits for up to four months, starting after she had been disabled for 30 days. Ace submitted an application for short-term disability benefits; Aetna concurred she was disabled and paid the benefits. [App. 3a; 1 Tr. 189-90; ER 20].

Unfortunately for Ace, the osteotomy was not successful. The pain in her leg increased, and Ace did not believe she was capable of returning to work even half-time. [App. 3a; 1 Tr. 188-91; ER 101].

B. Aetna's Wrongful Denial Of Ace's Disability Claim

Ace contacted Aetna and obtained an application for long-term disability benefits. She submitted her application in October, 1992, along with the required Attending Physician's Statement, on which her doctor explained that she suffered from "severe degenerative joint disease" and experienced "frequent swelling" and "constant pain." He classified her on Aetna's form as between "Class III" and "Class IV" in terms of her disability, which the form characterized as capable of only light or sedentary work. [App. 4a; ER 55-56]. Ace's supervisor had earlier provided Aetna with a detailed job description indicating that her regular duties included travel that could not be considered "light" or "sedentary" work, since she was required to inspect properties in rural Alaska that could only be visited by riding small planes and "three-wheelers," the all-terrain vehicles used in isolated locations without maintained roads. [App. 5a & n.6; 4 Tr. 8-9, 11-13; ER 111, 113-14].

Ace called Aetna several times to check on the status of her claim. Aetna's records indicated that she advised that she had no money and urgently needed her claim approved. [App. 4a; ER 122-23].

Aetna denied Ace's long-term disability claim on November 17, 1992. The denial letter stated in part, "In order to be eligible for Long-term Disability Benefits, you must be totally disabled to the extent that you are unable to work at any gainful occupation due to bodily injury or illness." The letter also stated that Aetna considered her job duties sedentary. [App. 4a-5a; ER 57-58]. Aetna conducted no investigation before denying the claim, although a reasonable investigation is required under Alaska law. *See* Alaska Stat. 21.36.125(3); 3 Alaska Admin. Code § 26.050(a). At trial, Aetna conceded that no one from Aetna ever contacted Ace, her doctors, or her supervisor in order to clarify either her medical condition or the requirements of her employment. [App. 5a; 3 Tr. 121; 7 Tr. 6; ER 139-40, 162].

The key phrase in the denial letter -- "unable to work at any gainful occupation" -- is taken from Aetna's policy. However, Aetna conceded at trial that legally it could not deny benefits based on that standard.[2] [App. 5a-6a; 7 Tr. 11; ER 22]. Aetna contended it applied a different standard, but at trial Aetna's employees could not state consistently what standard they allegedly did apply, and they agreed they never advised Ace what other standard she had to meet to qualify for long-term disability benefits. [App. 5a-6a; 3 Tr. 18-19, 47-51, 90-91, 93]. Indeed, Aetna's corporate policy required employees to quote policyholders only the language of the policy. [App. 6a & n.9; 3 Tr. 49-50, 64-65, 81-82; ER 120].

Ace requested reconsideration of her claim. She provided Aetna with a long letter from her doctor, dated November 30, which explained that her condition had continued to deteriorate and

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[2] Courts have long held that the "unable to work at any gainful occupation" language may not be applied literally, because of the unfair and absurd results this would allow, such as denying disability benefits to a physician who could no longer perform his job duties but who could work as a custodian or sales clerk. *See, e.g., Aetna Life Ins. Co. v. Orr,* 169 S.W.2d 651, 654 (Ark. 1943); *Lorba v. Aetna Life Ins. Co.,* 207 So. 2d 305, 308-09 (Fla. App.), *cert. denied,* 212 So. 2d 876 (Fla. 1968).

that he now considered her to have a "Class V" disability, which Aetna defined as "[s]evere limitation of functional capacity; incapable of minimal (sedentary) activity." [App. 6a-7a; 1 Tr. 211-12; ER 50, 53-54]. Aetna again denied the claim. Its letter to Ace stated that she had provided "no objective medical evidence" to support her disability claim. [App. 7a; ER 48]. Aetna's employees and expert later conceded that Ace *had* supplied objective medical evidence; further, they agreed that objective medical evidence is neither defined nor required under Ace's policy and that a claims handler is required to consider all available evidence, including subjective complaints of pain. [App. 7a & n.11; 3 Tr. 68-69, 80-81; 6 Tr. 27; ER 120].

Ace requested reconsideration a second time. In February, 1993, she provided Aetna with a detailed letter from her doctor, explaining that she could not walk or sit for any length of time and reiterating that she should be considered "Class V" disabled (incapable of even sedentary employment). [App. 9a; ER 41-42, 44-45]. Ace also provided a recent evaluation from a physical therapist who determined, based on specific test results, that Ace was capable of sitting, standing, or walking for less than an hour each during the day; this physical capacities evaluation revealed that Ace was in *worse* physical condition in January than when the same tests were conducted by the same therapist six months earlier. [App. 9a; ER 43, 97]. A cover letter from a friend advised that Ace was in "fragile physical condition" and "emotionally and economically fragile as well," because of living with chronic pain aggravated by the frustration of dealing with Aetna. [App. 9a; ER 37-38]. Because she had no income, Ace was forced to sell much of her personal property and her home; she sent her son to live with another family and she lived in her car during six harsh weeks of Alaska's winter, washing herself in a gas station restroom. [App. 9a; 1 Tr. 222-27; 2 Tr. 16-20]. Aetna refused to reverse its denial of benefits. [App. 9a-10a; 3 Tr. 163; 6 Tr. 32; ER 30-31].

In April, 1993, in accordance with the recommendation of her doctors, who had wanted to give her knee a full year to recover from the trauma of the osteotomy, Ace underwent another surgery. [App. 10a; 2 Tr. 30]. This operation proved successful and Ace

was able to return to work, albeit with a limp and some pain, by June 1, 1993. [App. 10a; 2 Tr. 31].

C. District Court Proceedings

In 1994, Ace filed a lawsuit in Alaska state court. [ER 1-4]. Aetna removed the case to federal court on diversity grounds. [CR 1]. The case was tried to a jury in May, 1996. At trial, Aetna was far from contrite about its treatment of Ace. Instead, Aetna persisted in denying that Ace was entitled to any long-term disability benefits, blamed Ace for any difficulties she had experienced, and proudly maintained that it had handled Ace's claim properly and in accordance with corporate policies and procedures. Aetna contended that, if it erred in denying Ace's application, the error was at most negligent and not in bad faith; and, if there was bad faith, it was not malicious or with reckless indifference to Ace's interests, so no punitive damages should be awarded. [6 Tr. 187-220].

The jury rejected all of Aetna's claims. Jurors found that Ace was entitled to long-term disability benefits for nine months (from September, 1992, through May, 1993); that Aetna denied Ace's claim in bad faith; and that there was clear and convincing evidence that Aetna acted with malice, bad motives, or reckless indifference to Ace's interests, justifying punitive as well as compensatory damages under Alaska law. [App. 2a; ER 163-64].

Applying proper deference to the jury as factfinder, the district court denied Aetna's post-trial motion for judgment as a matter of law or a new trial on the bad faith claim. [App. 49a-50a, 58a-59a]. However, in reviewing the verdict on punitive damages, the district court failed to view the evidence in the record in its entirety and in the light most favorable to Ace; thus, the district court erroneously set aside the jury's determination and granted judgment as a matter of law to Aetna on the question of whether its conduct warranted punitive damages. [App. 59a-62a]. The district court also granted Aetna's subsequent conditional motion for a new trial on this issue. [App. 49a]. The district court did not reach

Aetna's alternative motion for a remittitur or a new trial on the amount of punitive damages. [App. 2a n.1].

D. The Court Of Appeals Decision

The Ninth Circuit affirmed the district court's rulings with respect to the bad faith claim and reversed the district court's rulings with respect to punitive damages. [App. 20a-21a]. The panel determined unanimously that the district court erred in not viewing the evidence in the light most favorable to Ace and in thereby granting judgment as a matter of law to Aetna on the question whether its conduct could be considered "outrageous" and in "reckless indifference to the interests of another." [App. 10a-13a]. The appeals court listed eight different ways in which the jury could find by clear and convincing evidence that Aetna's conduct warranted punitive damages under Alaska law:

> (1) basing denial of the claim on an illegal standard for benefit eligibility; (2) failing to inform the claimant of the standard actually used by Aetna in evaluating disability claims; (3) failing to investigate the claim and to seek or request the supporting information alleged to be missing; (4) failing to assist the claimant in presenting her disability claim; (5) relying on outdated prognoses of the claimant's expected recovery and disregarding recent reports of her actual condition; (6) denying her claim based on an undefined "requirement" not a term of her policy and contrary to Aetna's internal claim adjustment guidelines; (7) falsely advising the claimant that Aetna had no claim adjustment guidelines; and (8) making a last-minute demand for an IME [independent medical evaluation] after having denied the claim.

[App. 12a-13a (footnotes omitted[3])].

Aetna does not now contest the Ninth Circuit's ruling reversing the district court's improper grant of judgment as a matter of law.

The Ninth Circuit also reversed the district court's conditional grant of a new trial on liability for punitive damages. [App. 14a-15a]. The appellate opinion correctly characterized much of the evidence concerning Aetna's bad faith and liability for punitive damages as undisputed, since the direct evidence of Aetna's claim handling was established by its claim file, the contents of which were undeniable. [App. 12a; ER 28-112]. Indeed, at trial Aetna's representatives endorsed the manner in which the claim was handled, saying that its adjusters processed Ace's claim in complete accordance with company policy. [*See, e.g.*, 3 Tr. 31, 50; 4 Tr. 138; ER 120]. The Ninth Circuit found no legal basis for ordering a new trial; it noted that the district court had not issued a detailed opinion but had stated simply that "[i]n general" it accepted Aetna's arguments for a new trial, which did little other than repeat the claim that the verdict was unsupported by any evidence. [App. 14a; *see* App. 49a; CR 228, at 6-9]. Accordingly, the Ninth Circuit held that the district court abused its discretion in granting a new trial on Aetna's punitive damages liability. [App. 14a-15a].

The appellate court briefly addressed the amount of punitive damages, although the district court had never reached this issue. The appeals court concluded that the award was excessive under Alaska law and remanded the case to the district court with instructions to determine the appropriate remittitur. [App. 15a-

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[3] The footnotes to the court's opinion refer to Alaska statutes and administrative rules establishing fair claim handling procedures, which Aetna violated when evaluating Ace's claim. [App. 12a-13a nn.18-19, citing Alaska Stat. 21.36.125(1), (14); 3 Alaska Admin. Code § 26.040(a)(3)].

16a]. Further proceedings in the district court concerning the allowable amount of the punitive award are pending. [CR 266].

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE STANDARD FOR SETTING ASIDE A JURY VERDICT BASED ON LEGALLY SUFFICIENT EVIDENCE.

A. FRCP 50(c)(1) Explicitly Provides For Appellate Review Of An Order Conditionally Granting A New Trial.

Aetna opens its petition by asserting that it is "questionable whether conditional new-trial orders based on the 'weight' of the evidence are reviewable at all." Pet. 14-15. Aetna is wrong.

Aetna's attempt to create an interesting question of federal civil procedure relies solely on language in a 58-year-old case, which predated the adoption of FRCP 50(c)(1).[4] Aetna disregards the clear language of the federal rule, the clear language of the Advisory Note explaining the rule, this Court's comments on Rule 50, and commentary by respected treatise writers explaining why a rule allowing appellate review makes good sense. Even Aetna concedes that no Circuit now holds that a conditional new trial order under Rule 50(c) is unreviewable. Pet. 15.

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[4] Further, Aetna did not argue below that appellate review was improper. This Court ordinarily will not grant certiorari on issues not raised and fully briefed in the lower courts. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 388 n.* (1990); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989).

Federal Civil Rule 50(c)(1) expressly authorizes appellate review of a conditional new trial order. The rule states that, if the appellate court reverses an order granting judgment as a matter of law, the appellate court shall determine whether or not a new trial should be held:

> In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed *unless the appellate court has otherwise ordered.*

FRCP 50(c)(1) (emphasis added).

The Advisory Committee Note to the 1963 Amendment to FRCP 50, which added subdivision (c), also makes clear that the rule contemplates appellate review of a conditional new trial order. The Note describes the precise situation that occurred in this case:

> And the appellate court, if it reverses the judgment n.o.v., may in an appropriate case also reverse the conditional grant of the new trial and direct that judgment be entered on the verdict.

This Court, considering the then-new provisions in Rule 50, observed that Rule 50(c) explicitly provides "that the appellate court will review on appeal both the grant of judgment *n.o.v.* and, if necessary, the trial court's conditional disposition of the motion for new trial." *Neely v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 323 (1967).

Older cases, which occasionally assumed that a conditional new trial order was not reviewable, based that erroneous view on an overbroad interpretation of this Court's early cases. Professors Wright, Miller, and Kane thoughtfully distinguish the sometimes problematic review and reversal of an order *denying* a new trial (when an appellate court substitutes its view of the facts for those of the jury and the trial judge) from the situation in the current case where the appellate court reviews and reverses an order *granting* a new trial (when the appellate court reinstates the jury's verdict):

> Review of an order granting a new trial because the verdict is against the weight of the evidence is a different matter. The older cases did not perceive the difference and often said that neither the grant nor denial was reviewable. There is no Seventh Amendment problem, however, if the appellate court reverses the trial court's grant of a new trial. In this instance the appellate court is not reexamining facts found by a jury but is reinstating the jury's findings as against the contrary findings of the judge. Appellate action in this context protects the role of the jury, as envisioned by the Seventh Amendment, rather than running contrary to it.

11 Charles A. Wright, Arthur R. Miller, & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURE § 2819, at 205 (2d ed. 1995) (footnotes omitted).

Appellate review of a conditional new trial order is important to protect the right to a jury trial from infringement by a district court too eager to substitute its views for the jury's. Aetna's attempt to persuade this Court to grant certiorari because there is something wrong or controversial about appellate review must fail.

B. All Circuits Preclude A District Court From Casually Substituting Its View Of The Facts For The Jury's Verdict.

Aetna devotes the bulk of its petition to a claim that certiorari should be granted to resolve an alleged conflict in the Circuits concerning when a district court may set aside a jury verdict on the ground that the verdict is against the weight of the evidence. Pet. 12-13, 15-19. This argument has no merit.

There is no inter-Circuit conflict. Every Circuit agrees that the district court may not lightly substitute its view of the facts for the jury's verdict. Although different decisions use slightly

different words, recent decisions from every Circuit articulate the principle that the district court may not casually set aside a jury verdict because it views evidence in a different manner than the jury did. Accordingly, all Circuits apply a stringent standard and hold that a new trial should not be granted due to perceived weakness in the proof unless the verdict is seriously erroneous, a miscarriage of justice, or against the clear or great weight of the evidence:

> *Bogosian v. Mercedes-Benz*, 104 F.3d 472, 482 (1st Cir. 1997): "A new trial is warranted only if the verdict, though rationally based on the evidence, was so clearly against the weight of the evidence as to amount to a manifest miscarriage of justice." (internal quotes omitted)
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> *Atkins v. New York City*, 143 F.3d 100, 102 (2d Cir. 1998): "A motion for a new trial ordinarily should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." (internal quotes omitted)
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> *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1076 (3d Cir. 1996) (en banc), *cert. denied*, 117 S. Ct. 2532 (1997): "[A] district court should grant a new trial on the basis that the verdict was contrary to the weight of the evidence only where a miscarriage of justice would result if the verdict were to stand." (internal quotes omitted)
>
> *Atlas Food Systems & Services, Inc. v. Crane National Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996): "[I]t is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that [1] the verdict is against the clear weight of the evidence, or [2] is based upon evidence which is false, or [3] will result in a miscarriage of justice . . . ." (internal quotes omitted)

Pryor v. Trane Co., 138 F.3d 1024, 1026 (5th Cir. 1998): "A trial court should not grant a new trial on evidentiary grounds unless the verdict is against the great weight of the evidence." (internal quotes omitted)

Strickland v. Owens Corning, 142 F.3d 353, 357 (6th Cir. 1998): "[A] new trial is warranted when a jury has reached a seriously erroneous result as evidenced by . . . the verdict being against the weight of the evidence." The same paragraph explains that this means the judge may set aside the verdict if it is "against the clear weight of the evidence." (internal quotes omitted)

Miksis v. Howard, 106 F.3d 754, 757 (7th Cir. 1997): "A new trial may be granted if the verdict is against the clear weight of the evidence . . . ."[5]

Mears v. Nationwide Mutual Insurance Co., 91 F.3d 1118, 1123 (8th Cir. 1996): "The district court may order a new trial where it is convinced that the verdict goes against the clear weight of the evidence . . . ."

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[5] It is clear that the Seventh Circuit panel that decided *Miksis* did not see itself as applying a standard different from the standard in *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997), the case that Aetna cites as supposedly signaling a departure in the Seventh Circuit's standard of review of new trial orders. Pet. 18. The same Circuit Judge, Eschbach, authored both opinions. Further, *Medcom*, although issued for publication approximately a week after *Miksis*, was circulated to all active judges in the Seventh Circuit before its publication. 106 F.3d at 1397 n.3. At least one subsequent decision has cited both *Medcom* and *Miksis* without suggesting that the cases conflict. *Hulbert v. Wilhelm*, 120 F.3d 648, 656 (7th Cir. 1997).

Ace v. Aetna Life Insurance Co., 139 F.3d 1241, 1248 (9th Cir. 1998) [App. 14a]: "A district court may order a new trial based on insufficient evidence only if it finds that the jury's verdict is against the great weight of the evidence, or it is quite clear that the jury has reached a seriously erroneous result." (internal quotes omitted)

York v. American Telephone & Telegraph Co., 95 F.3d 948, 958 (10th Cir. 1996): "Where a party moves for a new trial on the ground that the jury verdict is not supported by the evidence, the verdict must stand unless it is clearly, decidedly or overwhelmingly against the weight of the evidence." (internal quotes omitted)

Carter v. DecisionOne Corp., 122 F.3d 997, 1004 (11th Cir. 1997): "A motion for new trial may only be granted when the jury's verdict is against the great weight of the evidence."

McNeal v. Hi-Lo Powered Scaffolding, Inc., 836 F.2d 637, 646-47 (D.C. Cir. 1988): "If . . . a new trial is granted on the ground that the verdict was against the weight of the evidence, the [trial] judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial." (internal quotes omitted)[6]

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[6] *See also Thompson v. International Association of Machinists*, 614 F. Supp. 1002, 1013 (D.D.C. 1985) ("Out of (continued...)

> *Oiness v. Walgreen Co.*, 88 F.3d 1025, 1028 (Fed. Cir. 1996), *cert. denied*, 117 S. Ct. 951 (1997): "[A] trial court must review the record to determine whether the jury's verdict contravenes the clear or great weight of the evidence." (internal quotes omitted)

The supposedly conflicting authority that Aetna cites in an effort to manufacture an inter-Circuit conflict reflects nothing more than the different verbal formulations that courts often use to express the same fundamental concept. Indeed, the same opinion, even the same paragraph, may use both phrases "against the weight of the evidence" and "against the clear weight of the evidence." *E.g.*, *Strickland v. Owens Corning*, 142 F.3d at 357; *Atlas Food Systems & Services, Inc. v. Crane National Vendors, Inc.*, 99 F.3d at 594. After surveying the slightly different language employed by various courts, one leading treatise on federal civil procedure states, "It may be doubted whether there is any verbal formula that will be of much use to trial courts in passing on motions of the type now being considered." 11 FEDERAL PRACTICE AND PROCEDURE, *supra*, § 2806, at 74.

Another well-regarded treatise on federal civil procedure observes that, regardless of the language used, it is the practice of appellate courts to review extra carefully any order by a district court setting aside a verdict on the ground that it is against the weight of the evidence:

> [B]ecause of the danger of having a judge substitute his or her judgment for that of the jury, appellate

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[6] (...continued)
respect for the function of the jury as the trier of fact, an allegation on a motion for new trial that the verdict is against the weight of the evidence will generally be rejected unless it is quite clear that the jury has reached a seriously erroneous result, and the district judge finds the verdict contrary to the great weight or clear weight of the evidence.") (internal quotes and citations omitted).

> courts exercise a greater degree of scrutiny to the grant of a new trial . . . . The broad discretion afforded to the trial court is tempered by the deference due to a jury. The appellate court must ensure that the evaluation of the credibility of witness testimony remains the sole domain of the jury.

12 James W. Moore, MOORE'S FEDERAL PRACTICE, § 59.54[4][a], at 59-131 (3d ed. 1997). The most recent edition notes no conflict among the Circuits.

This deferential view, respecting the authority of the jury to determine the facts, derives from long-established principles enunciated by this Court. More than half a century ago, in *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1944), this Court wrote:

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. . . . Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

See also Browning-Ferris Industries, 492 U.S. at 278 (reiterating that it is not the role of the court to substitute its judgment for that of the jury).

In short, there is no conflict among the Circuits concerning the appellate courts' duty to ensure that district court judges respect the function of the jury as the primary factfinder. Aetna's petition for certiorari, based on an invented conflict, should be denied.

C. *Gasperini* Did Not Modify The Applicable Standard of Review.

Aetna suggests that *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), modified the standard that appellate courts should use in reviewing orders granting new trials. Pet. 17-19.

Aetna did not present this argument to the Ninth Circuit, either in its original briefing or in its petition for rehearing and suggestion for rehearing en banc. This Court should not grant certiorari to review an issue that has not been fully litigated in the lower courts. *See, supra,* at __ n.__.

Moreover, Aetna's heavy reliance on *Gasperini* is misplaced. *Gasperini* has little relevance to this case. *Gasperini* did not address the issue on which Aetna seeks review: the standard for appellate review of an order granting a new trial based on the district court's belief that the verdict on liability for punitive damages was against the weight of the evidence. *Gasperini* dealt exclusively with judicial review of the *amount* of damages, an area where some courts previously believed no appellate review was allowed at all. 518 U.S. at 434; MOORE'S FEDERAL PRACTICE, *supra,* § 59.54[4][b][i], at 59-132.[7] The central holding in

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[7] Likewise, with only one exception, the cases that Aetna cites to suggest a change in the law or a conflict among the Circuits all deal with appellate review of a new trial order based on the *amount* of the verdict, rather than with a new trial based on the district court's disagreement with the jury verdict on liability. *See Kirsch v. Fleet Street, Ltd.*, __ F.3d __, 1998 WL 334714, at **12-14 (2d Cir. June 25, 1998) (affirming a remittitur on the amount of compensatory damages); *Kelley v. Airborne Freight Corp.*, 140 F.3d 335, 355-56 (1st Cir. 1998) (affirming district court decision not to grant remittitur or new trial on amount of damages); *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d at 1397 (reversing district court order granting a new trial on amount

(continued...)

Gasperini is that "'The proper role of the trial and appellate courts in the federal system in reviewing *the size of jury verdicts* is . . . a matter of federal law.'" 518 U.S. at 437, quoting *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977) (italics added).

In authorizing judicial review of the amount of a verdict in order to determine whether it is excessive, *Gasperini* in no way undermined or overruled *Tennant* or *Browning-Ferris* or any of the myriad other cases by this Court that emphasize the limited authority of the district court to substitute its view of the facts for the verdict found by a properly instructed jury. Aetna's suggestion that *Gasperini* changed the law on reviewing jury verdicts on punitive liability is mistaken and is not a basis for granting certiorari.

D. Aetna's Petition Asks This Court To Re-Evaluate The Facts And Presents No Legal Issue Of Nationwide Importance.

1. The appeals court applied the correct legal standard in reviewing an order entered with minimal explanation or analysis.

The Ninth Circuit, like every other Circuit, reviews a district court order granting or denying a partial new trial using the abuse-of-discretion standard. The panel applied that standard in this case. [App. 14a]. The Ninth Circuit en banc saw no error in the application of that standard warranting full Circuit review.

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[7] (...continued)
of damages).

The exception is *Santa Maria v. Metro-North Commuter Railroad*, 81 F.3d 265, 273-75 (2d Cir. 1996), in which the appellate court reversed the district court order denying a new trial on all issues; however, the weight of the evidence was not an issue in the new trial ruling, so Aetna's cite to this case relies on dictum.

Aetna maintains that the Ninth Circuit panel paid lip service to the proper standard but actually exercised a more intrusive scrutiny. Pet. 19-24. There is no basis for this claim. The Ninth Circuit applied the standard it said it applied. What Aetna really argues is that the jury and the Ninth Circuit should have accepted Aetna's view of the facts. This claim is also meritless. This Court has no reason to grant certiorari to review the facts yet again.

An appellate court's determination that the district court abused its discretion in substituting its view of the facts for that of the jury is an unremarkable holding. Cases from around the country reverse orders granting a new trial because the appeals court concludes that the district court abused its discretion in finding the verdict against the clear weight of the evidence.[8] This Court, too, has made clear that an appellate court, applying the abuse-of-discretion standard properly, should reverse when the district court makes a discretionary ruling based on a clearly erroneous assessment of the evidence. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling . . . on a clearly erroneous assessment of the evidence."); *see also Gasperini*, 518 U.S. at 435 ("We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit . . . ."). Even Aetna concedes that the abuse-of-discretion standard does not require the appellate court to rubberstamp every discretionary decision by the district court. Pet. 20.

Aetna contends that "[w]here the district court makes a reasoned decision about the quantity and quality of the evidence supporting a verdict and decides a new trial is appropriate, the court of appeals should defer to the trial judge's assessment of the

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[8] *E.g.*, *Binder v. Long Island Lighting Co.*, 57 F.3d 193, 201-02 (2d Cir. 1995); *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1353-54 (3d Cir. 1991); *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1523-26 (6th Cir. 1990); *Rosenfield v. Wellington Leisure Products, Inc.*, 827 F.2d 1493, 1497-98 (11th Cir. 1987).

evidence . . . ." Pet. 20-21. Aetna is correct in the abstract, but the abstract does not reflect the reality of this case.

The district court in the current case offered no carefully reasoned decision supporting a new trial. In granting a new trial on the question of liability for punitive damages, the district court wrote only that "[i]n general" it agreed with Aetna's arguments for a new trial. [App. 49a]. Those arguments emphasized Aetna's and the district court's belief that the evidence did not support the punitive damages verdict. [CR 228 at 5[9]]. Neither Aetna nor the district court ever articulated an analysis of the evidence in this case that would allow a finding that the verdict on punitive damages was supported by clear and convincing evidence (as it must be under Alaska law to survive a motion for directed verdict or judgment as a matter of law), but was against the great weight of the evidence (so as to justify ordering a new trial). In fact, the district court made no explicit finding that the verdict was against the weight -- much less against the clear or great weight -- of the evidence, and the Ninth Circuit, based on its own thoughtful review of the record, concluded that the record could not support such a finding. [App. 15a]. In this case, the Ninth Circuit reversed the judgment as a matter of law based on its determination that the district court had "ignored significant and undisputed evidence" and failed to consider the evidence as a whole; this determination also strongly supported the appeals court's companion conclusion that the new trial order -- which rested on the same reasoning as the judgment as a matter of law -- was legally erroneous. [App. 13a-15a].

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[9] Aetna's memorandum in support of the new trial motion incorporated its memorandum in support of the motion for judgment as a matter of law *and* the district court's order granting that motion. Aetna wrote: "For the reasons set forth in this Court's July 2 Order [App. 51a-62a] and in Aetna's Rule 50 motion (Aetna JMOL Mem. 8-44), the jury's verdict on punitive liability under Alaska law is -- at the very least -- against the weight of the evidence." [CR 228 at 5 (internal quotes omitted)].

2. The question whether a district court abused its discretion in granting a new trial on weight-of-evidence grounds is an intensely fact specific inquiry.

The question whether a district court abused its discretion in granting a conditional new trial is intensely factbound, as is evident from any opinion evaluating an order granting or denying a new trial on weight-of-the-evidence grounds. In the present case, to determine whether the district court erred, the Ninth Circuit was obliged to review the complete trial transcript and hundreds of pages of exhibits, including medical records and claim files, all of which is summarized in the lengthy fact section of the appellate opinion. [App. 3a-10a]. Based on this detailed review, the Ninth Circuit determined that the record amply supported the jury verdicts both on bad faith and liability for punitive damages and failed to support a grant of judgment as a matter of law or a new trial. [App. 3a-13a, 17a-18a].

Aetna's petition suggests the complex factual review that would be required by this Court if certiorari were granted. Reviewing Aetna's arguments would require this Court to determine the quantity and quality of evidence supporting the jury's determination that Aetna acted outrageously in handling Ace's disability claim. Only with a full understanding of all the facts could this Court decide whether the Court of Appeals erred in holding that the district court erred in concluding that the verdict was unsupported by the evidence.

Aetna challenges two of the eight bases the appeals court listed for finding Aetna's conduct outrageous. Pet. 22-24. In reality, these arguments challenge the Court of Appeals' determination concerning the motion for judgment as a matter of law, a holding that Aetna does not ask this Court to review. Aetna does not tie its arguments to reasons why the Court of Appeals allegedly erred with regard to the ruling on the new trial.

In any event, Aetna's claims that the Court of Appeals committed reversible error are unfounded. Aetna argues, for its

first example, that the Ninth Circuit should have deferred to the district court's finding that Aetna used a legal standard in denying Ace's benefits. Pet. 22-23. However, the appellate court properly could find that the district court erred in disregarding Aetna's correspondence to Ace (which cited *only* the *illegal* standard) [ER 30-31, 48, 57], and in disregarding the fact that the jury did not have to accept Aetna's witnesses' self-serving testimony about the standard they claimed they applied. [*See, e.g.*, 3 Tr. 18-20, 47-50; 6 Tr. 8-9]. Furthermore, no new trial would be warranted even if Aetna used the legal standard, because the verdict is amply supported by the seven other ways in which Aetna's claim handling practices manifested reckless indifference to Ace's interests.

Aetna's second example contends that the district court appropriately found that the claim handler acted reasonably in determining that Ace's job was sedentary. Pet. 23-24. However, again the appellate court properly could find that the district court erred in disregarding evidence presented to the jury; unquestionably, Aetna's claim file included the detailed job description that showed that Ace's job required rigorous, non-sedentary travel. [ER 111, 113-14]. Moreover, Aetna does not explain how Ace's disability claim properly could have been denied after her doctor and physical therapist reported she was unable to perform even sedentary jobs. [ER 41-45, 53-54].

Much testimony and extensive briefing were devoted to these specific factual issues. The factual disputes that Aetna asks this Court to review were entrusted to the jury to decide. The jury resolved the disputes in Ace's favor. The district court reassessed the facts, and the appellate court thoughtfully reviewed the record and determined that the district court abused its discretion in substituting its view for the jury's. A full factual review by this Court would establish that the appellate court, and not the district court, was correct in how it evaluated the record on each point raised by Aetna, but deciding where the weight of the evidence lies involves no legal matter of national significance that justifies this Court's review of this case.

II. THIS CASE DOES NOT IMPLICATE THE DUE PROCESS CONCERNS RAISED IN CASES INVOLVING POST-VERDICT JUDICIAL REVIEW OF THE AMOUNT OF PUNITIVE DAMAGES AWARDS.

Aetna's second asserted ground for granting certiorari is as spurious as its first. Aetna has tried to manufacture error where none exists by using cases concerning review of large punitive damages awards in a situation where the size of the award is not even an issue. Pet. 24-26.

This Court has developed a body of jurisprudence requiring meaningful and adequate judicial review of potentially excessive punitive damages awards. *See, e.g., BMW v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

All of those cases are inapposite to this case at this time. The *amount* of the punitive award is *not* an issue before this Court. The Ninth Circuit *accepted* Aetna's argument that the jury's punitive damages verdict was excessive and remanded the case to the district court to determine a remittitur. [App. 16a]. Arguments based on any alleged failure to provide post-verdict review consistent with due process must wait until the post-verdict review process has been completed. From Aetna's perspective, the requirement of thoughtful judicial review of potentially excessive punitive awards is working well: the law of this case is that the jury's award was excessive under Alaska law and a remittitur must be granted. [App. 16a]. No due process concerns about the adequacy of post-verdict review are implicated in this case at this time.

None of this Court's cases suggest that due process requires special review of a jury's factual determination that a defendant acted "with reckless indifference to the rights of another" or special

deference to a district court's contrary determination that punitive damages are not warranted, and Aetna's petition offers no rationale for extending the cases. Whether punitive damages are legally justified is a matter of state law; states utilize many different legal standards. In its petition to this Court, Aetna does not challenge the Ninth Circuit's holding that evidence in the record was legally sufficient to sustain the jury's finding that Aetna's conduct warranted imposing punitive damages under Alaska law. [App. 10a-13a]. Any argument for extending due process concerns to review of the verdict establishing punitive liability should await a case where the petitioner claims before this Court that there was an insufficient basis to award punitive damages against it.

III. THERE IS NO REQUIREMENT THAT AN APPELLATE COURT REMAND A CASE TO THE DISTRICT COURT FOR A STATEMENT OF ITS REASONS FOR GRANTING A NEW TRIAL WHERE THE DISTRICT COURT STATED THAT IT ACCEPTED THE REASONS OFFERED BY THE DEFENDANT AND NONE OF THOSE REASONS JUSTIFY A NEW TRIAL.

Aetna's final argument for granting certiorari begins with a misstatement of fact. Aetna asserts it offered the district court seven independent grounds for granting a new trial; it criticizes the Ninth Circuit for not explicitly considering each of these grounds before reversing the order granting a new trial. Pet. 27.

Aetna in fact offered the district court just three arguments for granting a new trial on the issue of Aetna's liability for punitive damages. *See* Pet. 9.[10] Aetna's primary argument for a new trial

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[10] Aetna counts seven arguments by including those that it offered to the district court in support of its motion for a new trial on the *amount* of punitive damages. [CR 228]. While the Ninth Circuit did not address those arguments explicitly, it obviously accepted one or more of them, because it vacated the punitive

(continued...)

was that the verdict was against the weight of the evidence. The Ninth Circuit correctly concluded that this was the main reason relied on by the district court, and then expressly analyzed and rejected that basis for ordering a new trial. [App. 14a]. Thus, Aetna's argument to this Court reduces to a claim that the Ninth Circuit erred by not remanding to have the district court state explicitly the extent, if at all, to which it relied on Aetna's two subsidiary arguments when it granted a partial new trial.

The two grounds for a new trial that the Ninth Circuit did not explicitly address received only token attention before the lower courts. Aetna devoted a total of three pages to both arguments in its motion to the district court, then gave the same cursory attention to these arguments on appeal. [CR 228 at 6-9; Aetna's Brief as Appellee/Cross-Appellant at 43-46]. A remand to allow the district court to address these issues explicitly would have been pointless, since neither of the subsidiary grounds could support a new trial.

Contrary to Aetna's exaggerated claims, the Ninth Circuit's approach to Aetna's subsidiary arguments did not depart from established appellate procedure. There was no need for the Ninth Circuit to remand or to draft a more detailed opinion expressly addressing Aetna's minor arguments. Remanding is one option when the district court fails to offer adequate explicit grounds to justify a ruling, but it is not the only legitimate choice. An inflexible rule requiring an appeals court to remand whenever the district court issues a minimally explained and unsupported order would be inefficient and would ill serve the judiciary.[11]

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[10] (...continued)
damages award, exactly as Aetna requested. [App. 15a-16a]. Aetna has no basis for complaining to this Court about the Ninth Circuit's response to those arguments.

[11] A sampling of cases from around the country demonstrates that appellate courts often reach a final decision on a new trial question, even when the district court has not clearly (continued...)

In the current case, no remand was required, because the appellate court could determine from the record that the alternative grounds presented to the district court could not possibly support an order for a new trial, even if the trial court were persuaded by them.

Aetna's first alternative ground was a claim that a small portion of testimony by Ace's expert was unduly speculative. [CR 228 at 6-7]. The expert's testimony largely was devoted to explaining how Aetna acted in bad faith and breached its duties to Ace. [3 Tr. 198-99, 202-27]. That testimony was not speculative and Aetna lodged no objection to it. The only supposedly speculative testimony admitted over Aetna's objection was the expert's assertion that, if an insurer interprets a policy in a manner different from its literal language, the insurer should explain this to policyholders, because failure to do so can be confusing and

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[11] (...continued)
explained its bases for granting or denying a new trial. *See, e.g., Collazo-Santiago v. Toyota Motor Corp.*, __ F.3d __, 1998 WL 363856 at *5 n.6 (1st Cir. July 9, 1998) (reviewing record to determine whether new trial would be warranted on any ground asserted by defendant); *Frumkin v. Mayo Clinic,* 965 F.2d 620, 625 (8th Cir. 1992) (district court abuses its discretion if it grants a new trial but fails to "articulate an adequate statement of reasons when granting a new trial on weight of evidence grounds"; no remand to give the district court a second chance to explain its decision is required); *United States v. Tobias,* 899 F.2d 1375, 1381 (4th Cir. 1990) ("Because the district court has not adequately justified its conditional grant of a new trial, and we perceive no basis to justify it, the order granting a new trial is vacated."); *Powell v. Lititz Mutual Ins. Co.,* 419 F.2d 62, 65 (5th Cir. 1969) (review is "hampered," but not forbidden, when the district court offers no detailed explanation of a ruling granting a new trial). *See generally Baxter Healthcare Corp. v. Spectramed, Inc.,* 49 F.3d 1575, 1582 (Fed. Cir.) (appellate courts review judgments, not opinions; the appellate court is free to examine the record to determine whether the facts support the judgment), *cert. denied,* 516 U.S. 906 (1995).

misleading and may discourage a claimant from pursuing a valid claim.[12] This testimony is common sense. The jury on its own could reach the same conclusion without expert testimony. A ruling by the district court that the expert's "speculative" testimony warranted a new trial on liability for punitive damages would have been an abuse of discretion. *See, e.g., Mears v. Nationwide Mutual Ins. Co.*, 91 F.3d 1118, 1123-24 (8th Cir. 1996) (district court abused its discretion in granting a new trial based on "speculative" testimony where there was sufficient evidence to support the verdict without the "speculative" testimony); *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1353-54 (3d Cir. 1991) (similar). The Ninth Circuit's failure to remand for further analysis or to affirm the new trial order on this alternative ground was not error.

Aetna's second alternative ground for a new trial was a brief unobjected-to comment by Ace's counsel in closing argument. [CR 228 at 7-8]. Aetna's failure to object during the trial waived any claim of error. *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 848 F.2d 613, 619 (5th Cir. 1988); *Computer Systems Engineering, Inc. v. Qantel Corp.*, 740 F.2d 59, 69 (1st Cir. 1984); FEDERAL PRACTICE AND PROCEDURE, *supra*, § 2805, at 57-58 & n.13; § 2809, at 99 & n.4 (citing cases from many Circuits). Moreover, the comment was neither improper nor prejudicial. The alleged "misconduct" was a half-sentence that made passing mention of two products liability cases widely covered in the media. [6 Tr. 228]. A ruling by the district court granting a new trial based on

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[12] Ace's counsel asked the expert what a reasonable insurance executive would expect would result from a policy of quoting claimants only the language of the policy and not explaining how it is applied, if the practical application differs from the literal policy language. Over objection, the expert testified, "I would expect that claims would be abandoned, claims would be dropped, and the insured wouldn't know that there was another standard or that there was any other way that they could get their claim paid, so they'd probably give up." [3 Tr. 210-12; *see also* 3 Tr. 219-20 (repeating similar testimony].

"prejudicial misconduct" in the closing argument would have been an abuse of discretion.

The Ninth Circuit's failure to address explicitly either of Aetna's two weak alternative grounds for a new trial or to remand to allow the district court to rule explicitly on these grounds was not error, because neither ground would justify a new trial. This Court should decline Aetna's request to grant certiorari and to develop a new, inflexible rule always requiring an appeals court to remand for clarification when the district court does not explain whether or not it has relied on grounds that the appeals court can determine are meritless.

CONCLUSION

Aetna's petition for certiorari should be denied.

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